BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OLGA RANGEL ALEMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,289
IBP, INC.	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the Award dated October 28, 1997, entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on March 17, 1998. The Director appointed Stacy Parkinson to serve as Appeals Board Member Pro Tem in place of Gary Korte who recused himself from this proceeding.

APPEARANCES

Michael C. Helbert of Emporia, Kansas appeared for the claimant. Tina M. Sabag of Dakota City, Nebraska appeared for the respondent. Michael G. Patton of Emporia, Kansas appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Based upon a 56 percent task loss and a 100 percent difference in pre- and post-injury average weekly wage, Judge Palmer found claimant had a 78 percent permanent partial general disability for the repetitive injury that she sustained while working for the respondent through February 26, 1994. Also, the Judge found claimant's average weekly wage was $385.92 and that the Workers Compensation Fund had no liability. The following issues are now before the Appeals Board on this review:

(1) What is the average weekly wage?

Claimant contends she either worked or was expected to work six days per week and, therefore, her base wage should be based on a 48-hour week. Respondent, on the other hand, contends that claimant's base wage should be calculated using a 5-day, or 40-hour, work week.

(2) What is the nature and extent of injury and disability?

Claimant contends she has a permanent partial general disability that is no less than the 78 percent found by the Administrative Law Judge.

Respondent contends that: (1) claimant voluntarily terminated her employment with the respondent and, therefore, any permanent partial general disability benefits that are awarded should be limited to the functional impairment rating; (2) claimant failed to prove her task loss; and (3) claimant failed to prove that she sustained simultaneous injury to her upper extremities and, therefore, she is entitled to receive benefits for separate scheduled injuries instead of an award for an unscheduled injury.

(3) What is the liability of the Workers Compensation Fund?

Respondent contends the Fund should be responsible for the injury to claimant's left upper extremity because claimant allegedly overused it to protect the right upper extremity.

(4) Is claimant entitled to medical benefits only pursuant to K.S.A. 44-501?

Claimant contends that respondent may not now for the first time on this review raise K.S.A. 44-501 as a defense. But if the Appeals Board finds that the issue was properly raised, claimant contends the requirement of the statute has been met as claimant left respondent's employment due to her pain and inability to continue to perform her assigned duties.

Respondent contends that K.S.A. 44-501 limits claimant's award to medical benefits only because she allegedly was not disabled for a period of at least one week from earning full wages.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) As indicated when the stipulations were taken at the regular hearing, Olga Aleman (formerly Rangel) claimed that she had injured her hands, wrists, elbows, and shoulders as a result of a series of accidents that she sustained while working for IBP from June 1992 through February 26, 1994. The parties stipulated that Ms. Aleman's accidental injury arose out of and in the course of employment with IBP during the period alleged.

(2) Ms. Aleman began working for IBP in January 1991. Between that date and her last day of work with IBP on February 26, 1994, Ms. Aleman's regularly assigned duties required the repetitive use of both upper extremities. The majority of the time that Ms. Aleman worked for IBP, she hooked and trimmed various cuts of meats. Her first job, which she performed for approximately four months, required her to trim 20 to 25 pound briskets. Her second job, which she referred to as "special trim" and which she performed for approximately two years, required her to trim and toss the meat above her head. Her third and final job required her to trim 60 pound chuck rolls. In all three jobs, Ms. Aleman handled and trimmed several hundred pieces of meat every workday.

(3) While performing the special trim job, Ms. Aleman began to experience symptoms in her shoulders. As she continued to work, her symptoms progressively worsened and spread to her wrists, neck, and left elbow. Ms. Aleman quit working for IBP on February 26, 1994, after her symptoms had worsened to the point that she could no longer physically perform the work. The testimony of both board-certified orthopedic surgeons Lowry Jones, Jr., M.D. and Sergio Delgado, M.D., are clear that Ms. Aleman is physically unable to perform her hook and knife jobs at IBP.

(4) After leaving IBP's employment, in June 1994 Ms. Aleman underwent left elbow surgery. Although additional surgery was recommended, as of the date of regular hearing in June 1996, Ms. Aleman had elected to forego more surgery. When she testified at her deposition in July 1996, Ms. Aleman had not worked for any employer after leaving IBP and was not looking for employment as she was content to stay home with her four children.

(5) The Appeals Board finds that Ms. Aleman sustained simultaneous, repetitive mini-traumas and injury to her upper extremities while working for IBP through February 26, 1994. That conclusion is based on Ms. Aleman's testimony that all three of the hook and knife jobs that she performed, which constituted the majority of her employment with IBP, Inc., required the same repetitive physical movement. Only the weight of the various cuts of meats differed.

(6) Ms. Aleman earned $8.04 per hour and either worked or was expected to work eight hours per day, six days per week. She did not prove the amount of overtime she earned or the amount of additional compensation items that she received while working for IBP. Therefore, the Appeals Board affirms Judge Palmer's finding that Ms. Aleman's average weekly wage for purposes of computing her workers compensation benefits is $385.92.

(7) The Appeals Board also affirms Judge Palmer's finding that Ms. Aleman has a 19 percent whole body functional impairment as a result of her bilateral upper extremity injuries and a 56 percent loss of ability to perform her former job tasks. Those conclusions are supported by the testimony of Drs. Jones and Delgado.

(8) Ms. Aleman has failed to prove she has made a good faith effort to find appropriate employment after leaving IBP.

(9) The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

(1) When a worker's hands and arms are simultaneously injured, the injuries are compensable as an injury to the body under K.S.A. 44-510e, even though the injuries did not manifest themselves simultaneously.[1]

Considering the entire record, the Appeals Board finds that Ms. Aleman sustained simultaneous injuries to both upper extremities and, therefore, her permanent partial general disability benefits should be computed under the provisions of K.S.A. 44-510e.

(2) Because hers is an "unscheduled" injury, permanent partial general disability is determined by averaging the percentages of task loss and difference in pre- and post-injury wages. K.S.A. 44-510e provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury, in any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be

[1] Depew v. NCR Engineering & Mfg., 263 Kan. 15, 947 P.2d 1 (1997), Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986).

> entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk [2] and Copeland.[3] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) As indicated in the findings above, Ms. Aleman's pre-injury average weekly wage is $385.92. Because she failed to prove that she has made a good faith effort to find appropriate employment, Copeland requires the Appeals Board to impute a post-injury wage. Because the vocational rehabilitation experts who testified did not address Ms. Aleman's present ability to earn wages, the Appeals Board takes official notice of the federal minimum wage and finds that Ms. Aleman retains the ability to earn $5.15 per hour, or $206 per week, which yields a 47 percent decrease in wages.

(4) Averaging the 56 percent task loss with the 47 percent reduction in earnings yields a 52 percent permanent partial general disability.

(5) Respondent argued that Foulk should apply and, therefore, Ms. Aleman's permanent partial general disability should be limited to her functional impairment rating. The Appeals Board disagrees. There is no evidence that Ms. Aleman has refused to attempt to perform an offered job. As indicated in the findings above, Ms. Aleman's former jobs at IBP are beyond her physical capabilities. Therefore, Ms. Aleman's termination at IBP cannot be viewed as an attempt to wrongfully manipulate her workers compensation award or as an act that is tantamount to wrongfully refusing to work. Under these facts, Foulk is not applicable.

(6) Respondent also argued for the first time to the Appeals Board that Ms. Aleman was not disabled from earning full wages the prerequisite period provided by K.S.A. 44-501(c) and, therefore, she should be limited to medical compensation only. K.S.A. 44-501(c) provides:

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

But the Appeals Board finds IBP's argument without merit. First, because the issue was not properly raised before the Administrative Law Judge to allow the parties to present evidence to address it, IBP, Inc. may not raise the issue for the first time on appeal. Second, in the event an appellate court finds that the issue was properly raised, the Appeals Board finds that Ms. Aleman established she terminated her employment with IBP because she was unable to continue to physically perform her regular work duties. Therefore, she has proven she was disabled "for a period of at least one week from earning full wages at the work at which the employee is employed."

(7) The Appeals Board affirms Judge Palmer's finding that the Workers Compensation Fund has no liability in this proceeding. Before July 1, 1994, when an employer knowingly hired or retained a handicapped worker and that worker later sustained an injury at work, the Workers Compensation Act apportioned liability between the employer and the Workers Compensation Fund to the extent the handicap or preexisting impairment caused or contributed to that later injury or ultimate disability.[4] But, in this instance, the Workers Compensation Fund has no liability because the series of repetitive mini-traumas constituted only one accidental injury, instead of two or more accidents. Additionally, because Ms. Aleman was neither handicapped nor impaired before the series of mini-traumas began, there is no Fund liability.

AWARD

WHEREFORE, the Appeals Board modifies the Award dated October 28, 1997, and reduces the permanent partial general disability from 78% to 52%.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Olga Rangel Aleman, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred February 26, 1994, and based upon an average weekly wage of $385.92 for 215.80 weeks of permanent partial disability compensation at the rate of $257.29 per week or $55,523.18, for a 52% permanent partial general disability, which is presently due and owing, less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

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[4] K.S.A. 44-567.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Emporia, KS
Tina M. Sabag, Dakota City, NE
Michael G. Patton, Emporia, KS
Philip S. Harness, Director